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10
11 IN THE UNITED STATES DISTRICT COURT
12 FOR THE NORTHERN DISTRICT OF CALIFORNIA
13 SAN FRANCISCO DIVISION

14 **BRADLEY M. HIXON,**

15 Plaintiff,

16 v.

17 **Correctional Officer J. CRUZEN,**

18 Defendant.
19

C 07-6078 WHA

**DEFENDANT'S NOTICE OF
MOTION AND MOTION TO
DISMISS AND MOTION FOR
QUALIFIED IMMUNITY**

20 TO PLAINTIFF BRADLEY M. HIXON, PRO SE:

21 PLEASE TAKE NOTICE that defendant J. Cruzen (Defendant) moves the Court to dismiss
22 this action under Rule 12(b) of the Federal Rules of Civil Procedure because Bradley M. Hixon
23 (Plaintiff) failed to exhaust his administrative remedies before filing this action, as required by
24 the Prison Litigation Reform Act (PLRA), 42 U.S.C. § 1997e(a), and Plaintiff also failed to state
25 a claim for relief against the Defendant.

26 PLEASE TAKE FURTHER NOTICE that the Court may look beyond the pleadings and
27 decide disputed issues of fact when ruling on Defendant's non-enumerated Rule 12(b) motion for
28 failure to exhaust administrative remedies. *Wyatt v. Terhune*, 315 F.3d 1108, 1119-20 (9th Cir.

Defendant's Not. of Mot. and Mot. to Dismiss and Mot. for Qualified Immunity

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2003). Plaintiff may provide evidence to the Court to dispute that which is presented by Defendants. *Id.* at n.14.

This motion is based on this Notice, the following Memorandum of Points and Authorities, the declarations and exhibits filed in support of this motion, the proposed order, and the pleadings and records on file with the Court in this action.

MEMORANDUM OF POINTS AND AUTHORITIES

ISSUES PRESENTED

1.) The PLRA requires an inmate to properly exhaust administrative remedies before filing civil-rights suits concerning prison conditions. Plaintiff's appeal was not exhausted because he did not complete the final level of review. 2.) Plaintiff fails to state a claim for relief because he did not satisfy all of the retaliation elements against the Defendant. 3.) Plaintiff does not to allege facts which show a violation of a constitutional right by Defendant, so he is entitled to qualified immunity.

Should this Court dismiss this action because Plaintiff failed to properly exhaust his administrative remedies and failed to state a claim for relief?

SUMMARY OF ARGUMENT

The Plaintiff cannot satisfy the PLRA's administrative remedies exhaustion requirement because the administrative appeal received no final Director's level review, and therefore did not properly exhaust all available administrative remedies.

STATEMENT OF THE CASE

Plaintiff Bradley M. Hixon, CDCR number T-78115, is a state prisoner incarcerated at Salinas Valley State Prison. On December 3, 2007, Plaintiff filed this action under 42 U.S.C. § 1983. This Court screened Plaintiff's complaint under the PLRA, and recognized one claim.

The recognized claim is a First Amendment claim against Salinas Valley State Prison correctional officer J. Cruzen, for allegedly retaliating against Plaintiff by cuffing him, threatening him, and writing a false rules violation complaint against him for Plaintiff insisting upon having a shower. (Order of Initial Review, Docket No. 5, dated Jan. 8, 2008, 2:15-17.)

//

STATEMENT OF FACTS

Plaintiff alleges that on November 11, 2007, Defendant falsely accused him of a rules violation, cuffed him, and threatened him, in retaliation for Plaintiff insisting upon having a shower. (Complaint, Docket No.1, dated Dec. 3, 2007, 3.)

On November 11, 2007, Defendant wrote a Rules Violation Report (RVR), A07-11-0045, against Hixon for threats on staff. (Medina Decl. ¶ 8, Ex. C.) Hixon was found guilty of the RVR. (Medina Decl. ¶ 8, Ex. C.)

The appeal bearing institutional log number SVSP-D-07-05091 was not exhausted at the Director's level. (Grannis Decl. ¶ 10.) More specifically, on November 27, 2007, Hixon submitted a CDC 602 appeal, bearing institutional log number SVSP-D-07-05091, as a staff complaint against the Defendant. (Medina Decl. ¶ 6.) At the first level of review, the appeal was partially granted. (Medina Decl. ¶ 6.) The appeal was not submitted by Hixon at the second level of review. (Id. ¶ 7.) Hixon then filed a Complaint regarding the November 11, 2007, incident with Defendant. (Complaint, Docket No. 1, dated Dec. 3, 2007.) On December 5, 2007, the appeal was received at the Inmate Appeals Branch for review at the Director's level. (Grannis Decl. ¶ 10.) On January 18, 2008, the appeal was screened out because it was not completed through the second level of review prior to submission to the Director's level of review. (Id. ¶ 10.)

ARGUMENT

I. THE PRISON LITIGATION REFORM ACT'S EXHAUSTION REQUIREMENT REQUIRES DISMISSAL OF UNEXHAUSTED CLAIMS.

A. LEGAL STANDARD

The PLRA requires that inmates exhaust their available administrative remedies before filing civil rights actions in federal courts. 42 U.S.C. § 1997e(a); *Porter v. Nussle*, 534 U.S. 516, 524 (2002); *McKinney v. Carey*, 311 F.3d 1198, 1199-1201 (9th Cir. 2002). Therefore, "[c]ompliance with prison grievance procedures . . . is all that is required by the PLRA to 'properly exhaust.'" *Woodford v. Ngo*, 126 S. Ct. 2378, 2384 (2006). The Supreme Court also affirmed that a prisoner must properly proceed through each stage of the administrative process,

1 to obtain a final Director's level of review in order to bring a federal lawsuit. *Id.* at 2387.

2 When an inmate-plaintiff fails to exhaust, a defendant may file a non-enumerated Rule
3 12(b) motion to dismiss. *Wyatt*, 315 F.3d at 1119-20 (9th Cir. 2003). In ruling on such a motion,
4 a court may look beyond the pleading to decide disputed issues of fact. *Id.* The proper
5 disposition for failure to exhaust is dismissal without prejudice. *Id.* at 1120.

6 **B. CALIFORNIA'S INMATE APPEALS PROCESS**

7 The grievance process in the State of California allows inmates in California prisons to
8 appeal "any departmental decision, action, condition, or policy which they can demonstrate as
9 having an adverse effect upon their welfare." Cal. Code Regs. tit. 15, § 3084.1. To exhaust this
10 process, before proceeding to federal court, an inmate must proceed four levels of appeal: (1)
11 informal level; (2) first formal level; (3) second formal level; and (4) third formal level, also
12 known as the Director's level review. *Id.* § 3084.5. A decision at the third formal level, or
13 Director's level of review, is final and constitutes exhaustion of available administrative
14 remedies. *Id.* §§ 3084.1(a), 3084.5(e)(2).

15 To initiate the inmate appeal process, inmates must use a form CDC 602 (Form) to
16 describe the problem complained of and the action requested. (Cal. Code Regs. tit. 15, § 3084.2;
17 *See Grannis Decl.* ¶ 2.) The inmate must submit the Form to the Appeals Coordinator within
18 fifteen working days (three weeks) of the action taken. *Id.* § 3084.6(c). The informal level of
19 review is bypassed for allegations of improper staff conduct. *Id.* §§ 3084.5(b).

20 **C. THIS ACTION MUST BE DISMISSED BECAUSE PLAINTIFF FAILED TO 21 EXHAUST ADMINISTRATIVE REMEDIES.**

22 On November 11, 2007, Hixon approached Defendant and insisted upon having
23 a shower. Defendant allegedly denied the shower, cuffed him and stated that Hixon made threats
24 towards him. (Complaint, Docket No.1, dated Dec. 3, 2007, 3.) On November 11, 2007,
25 Defendant wrote a Rules Violation Report (RVR), A07-11-0045, against Hixon for threats on
26 staff. (Medina Decl. ¶ 8, Ex. C.) Hixon was found guilty of the RVR. (Medina Decl. ¶ 8, Ex. C.)

27 A review of the evidence shows that the inmate appeal for this incident was not
28 exhausted. More specifically, on November 27, 2007, Hixon submitted a CDC 602 appeal,

bearing institutional log number SVSP-D-07-05091, as a staff complaint against the Defendant. (Medina Decl. ¶6.) At the first level of review, was partially granted. (Id. ¶ 6.) The appeal bearing institutional log number SVSP-D-07-05091 was not re-submitted by Hixon at the second level of review. (Id. ¶ 7.) On December 5, 2007, the appeal was received at the Inmate Appeals Branch. (Grannis Decl. ¶ 10.) On January 18, 2008, the appeal was screened out because it was not completed through the second level of review before it was submitted to the Director's level of review. (Id. ¶ 10.)

Additionally, by Plaintiff's own admission, he failed to exhaust his administrative remedies regarding these claims to the requisite third level of review. (Complaint, Docket No. 1, dated Dec. 3, 2007, 2D.)

On December 3, 2007, Hixon filed the Complaint regarding the November 11, 2007, incident with Defendant. (Complaint, Docket No. 1, dated Dec. 3, 2007.) But, he had not received any response from the Inmate Appeal Branch. (Grannis Decl. ¶ 10.) Exhaustion is an indispensable condition precedent to initiating an action in federal court. *McKinney v. Carey*, 311 F.3d 1198, 1199 (9th Cir. 2002).

Since Plaintiff failed to exhaust his administrative remedies through the requisite third level of review, the complaint should be dismissed under *Woodford v. Ngo*, 126 S. Ct. 2378, 2384 (2006).

II. PLAINTIFF FAILS TO STATE A CLAIM FOR RELIEF BECAUSE HE CAN NOT SATISFY ALL THE RETALIATION ELEMENTS AGAINST THE THE DEFENDANT.

Plaintiff's sole basis for relief is that Defendant allegedly retaliated against him by cuffing him, threatening him, and filing a false Rules Violation Report against him because Plaintiff insisted upon having a shower. (Complaint, Docket No.1, dated Dec. 3, 2007, 3.)

The Ninth Circuit holds that "a viable claim of First Amendment retaliation entails five basic elements: (1) an assertion that a state actor took some adverse action against an inmate (2) because of (3) that prisoner's protected conduct, and that such action (4) chilled the inmate's exercise of his First Amendment rights, and (5) the action did not reasonably advance a legitimate correctional goal." *Rhodes v. Robinson*, 408 F.3d 559, 568 (9th Cir. 2005); *Rizzo v.*

1 *Dawson*, 778 F.2d 527, 532 (9th Cir. 1985) (plaintiff must "allege that the prison authorities'
 2 retaliatory action did not advance the legitimate goals of the correctional institution or was not
 3 narrowly tailored enough to achieve such goals.").

4 Defendant's actions were in furtherance of legitimate penological goals such as
 5 preserving institutional order and discipline and did not violate Plaintiff's First Amendment
 6 Rights. As stated in Plaintiff's Complaint, Hixon admits that he was cuffed because Defendant
 7 believed he made threats against him. (Complaint, Docket No.1, dated Dec. 3, 2007, 3.)
 8 Defendant then wrote a RVR against Hixon for threats upon staff and Hixon was later found
 9 guilty of the RVR. (Medina Decl. ¶ 8, Ex. C.) Accordingly, Plaintiff's claim that Defendant
 10 retaliated against him should be dismissed because he can't show that Defendant's actions were
 11 anything but a preservation of the institutional order and discipline at Salinas Valley State Prison.
 12 As such, Hixon fails to state facts that support a cognizable claim for relief under 42 U.S.C. §
 13 1983.

14 **III. DEFENDANT IS ENTITLED TO QUALIFIED IMMUNITY.**

15 "(G)overnment officials performing discretionary functions . . . are shielded from liability
 16 for civil damages insofar as their conduct does not violate clearly established statutory or
 17 constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*,
 18 457 U.S. 800, 818 (1982). The Supreme Court has clarified that, in applying this standard, the
 19 threshold inquiry is whether the facts alleged show a violation of a constitutional right. *Saucier*
 20 *v. Katz*, 121 S.Ct. 2151, 2156 (2001). If the answer is no, there is no necessity for further inquiry
 21 and qualified immunity is established. *Id.* On the other hand, if the answer is yes, the court must
 22 further determine whether the contours of that right were sufficiently clear to put defendant on
 23 notice that his conduct under the circumstances was unlawful. *Id.* If the right was not clearly
 24 established, defendant is entitled to qualified immunity. *Id.* at 2156-57. Therefore, a prison
 25 official who acts under an objectively reasonable, albeit mistaken, belief that his actions were
 26 lawful is entitled to the protection of qualified immunity. *Hunter v. Bryant*, 502 U.S. 224, 227
 27 (1991).

28 As shown above, Plaintiff has failed to allege facts which show a violation of a

1 constitutional right by Defendant. Consequently, under *Saucier*'s first prong, Defendant is
 2 entitled to qualified immunity on Plaintiff's claims under § 1983.

3 Defendant also acted reasonably when initiating the Rules Violation Report. He believed
 4 Plaintiff made threats against him and Plaintiff was later found guilty of the Rules Violation.
 5 (Medina Decl. ¶ 8, Ex. C.) Defendant's actions were lawful and furthered the goal of preserving
 6 discipline within Salinas Valley State Prison, and he acted reasonably in the situation. Even if
 7 Defendant's belief regarding the Rules Violation was mistaken, he is entitled to the protection of
 8 qualified immunity. *Hunter v. Bryant*, 502 U.S. 224, 227 (1991).

9 CONCLUSION

10 Defendant respectfully requests that the court dismiss this action since Plaintiff failed to
 11 exhaust his available administrative remedies through the requisite third level. Additionally,
 12 Plaintiff fails to state a claim for relief against Defendant and Defendant is entitled to qualified
 13 immunity.

14 May 6, 2008

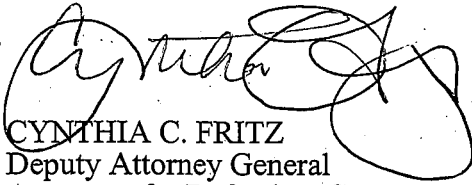
15 Respectfully submitted,

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